

STATE OF MICHIGAN
COURT OF APPEALS

SID HELDER, JOSEPH BETTEN, VERA
BETTEN, MARION BETTEN, and MARLENE
BETTEN,

UNPUBLISHED
February 2, 2006

Plaintiffs-Appellees,

v

TOWNSHIP OF GRATAN,

No. 256035
Kent Circuit Court
LC No. 03-006042-CK

Defendant-Cross-
Defendant/Plaintiff-Appellant,

and

EARTH TECH, INC.,

Defendant-Cross-Plaintiff/
Defendant.

Before: Fitzgerald, P.J., and O’Connell and Kelly, JJ.

FITZGERALD, P.J. (*concurring in part and dissenting in part*).

I disagree with the majority’s conclusion that plaintiff failed to present a genuine issue of material fact regarding defendant township’s construction knowledge of the defective wiring in the phase three monitor in pump station 5.

Under MCL 691.1417(3)(c), a person seeking compensation from a governmental agency for a sewage system event must establish that “the governmental agency knew, or in the exercise of reasonable diligence should have known, about the defect.” Legislative use of the phrase “should have known” references constructive as opposed to actual knowledge. *Echlen Homes, LLC v Carter Lumber Co*, 472 Mich 192, 197; 694 NW2d 544 (2005). Use of the phrase “should have known” in MCL subsection 17(3)(c) therefore allows for constructive knowledge to the governmental agency. Constructive knowledge is knowledge “that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person.” The language in subsection 17(3)(c) denotes the Legislature’s intent to hold a governmental agency liable where it fails to exercise reasonable diligence in the discovery of defects. Given the evidence that defendant township, through board and committee minutes, knew that the sewer system was in disrepair in general after twenty years of service without proper maintenance, an exercise of

reasonable diligence required defendant township to conduct a thorough inspection of the system.

As noted by the majority, defendant township contracted with Earth Tech, Inc., to operate and maintain its sanitary drain system and to review and upgrade the system's collection lift stations and grinder pump stations and the trial court properly imputed Earth Tech's knowledge regarding the condition of the system to defendant township. Although defendant township provided evidence in the form of affidavits that it did not actually know about the wiring defect and that no one at the township had the expertise to inspect the system, plaintiffs provided evidence that defendant township knew about the system's general state of disrepair and contracted with defendant Earth Tech to operate, maintain, and upgrade the system. And even though an Earth Tech employee stated in an email that "nothing could have been done during our routine operations checks that would have exposed [the defect], the record reveals that Earth Tech conducted more than "routine operations checks" of the system. Furthermore, the same employee, after his discovery of the defective wiring at issue, noted that all but one of the monitors had the same defect and that, "Perhaps this one [corrected monitor] was discovered to have a problem and someone corrected it but did not presume that the rest would be the same way so they didn't go any further." Given this evidence, whether defendant Earth Tech should have, through the exercise of reasonable diligence, discovered the wiring defect during its overall inspection of the system remains a factual question. Because a question of material fact remains as to whether defendant township, in the exercise of reasonable diligence and through the knowledge of defendant Earth Tech, should have known about the wiring defect in the sewer system, I would affirm the trial court's denial of defendant township's motion for summary disposition.

/s/ E. Thomas Fitzgerald